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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No. 417

WESTWOOD PHARMACAL CORPORATION, a corporation, and FOSTER-MILBURN COMPANY,

Petitioners,

vs.

JOHN FIELDING, JR. and DOLPH OBERGFEL,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of the State of California for the First Appellate District.

BRIEF FOR RESPONDENTS IN OPPOSITION.

EARL C. BERGER,
85 Post Street, San Francisco 4, California,
Attorney for Respondents.

EMMETT R. BURNS,
85 Post Street, San Francisco 4, California,

EDWARD A. FRIEND,
519 California Street, San Francisco 4, California,

HOBERG & FINGER,
702 Central Tower, San Francisco 3, California,
Of Counsel.

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OPINION BELOW.

The opinion of the District Court of Appeal (R. 55-61) is reported in 111 Adv. C.A. 505, 244 Pac. (2d) 968.

JURISDICTION.

The respondents contend that the Supreme Court of the United States has no jurisdiction because no federal question was either raised or considered in the Courts of California. Respondents' position in this matter will be delineated in a later section of this brief.

QUESTIONS PRESENTED.

The statement of questions presented by counsel for the petitioners omits the following elements:

(1) That the decision in the District Court of Appeal of California was based not upon the case of the *International Shoe Company v. State of Washington,* but was based upon the California precedents and the California statutes;

(2) That the local agent was the exclusive agent in California for the petitioners;

(3) That the local representative maintained a stock of the petitioners' products in his warehouse in California at all times and sent them a monthly report concerning it;

(4) That a sales representative from the petitioners' home office in New York State came out to California in order to give instructions to the local representative;

(5) That both the New York representative and the California representative managed a display booth at a medical convention in San Francisco, where the

petitioners' products were displayed under the petitioners' own name;

(6) That the local representative customarily held himself out to California customers as being an agent of the petitioners, that he so informed the petitioners, and that the petitioners not only acquiesced in this conduct, but that they approved and encouraged such conduct.

STATUTES INVOLVED.

The "due process" clause involved in this case, if any, is that contained in Section 13 of Article I of the California Constitution; further reference to this section will be made in a later section of this brief.

STATEMENT.

Petitioners' statement of the proceedings is substantially correct, except that no federal constitutional question was ever raised or decided in the Courts of California.

With respect to petitioners' contentions concerning the record, the "surmises" made by the District Court of Appeal, namely, that the suit was for injuries resulting from the use of pharmaceuticals manufactured by the petitioners, and that the plaintiff is a California resident, have a sound basis in fact and in truth and in the record of the Superior Court, irrespective

of their basis or lack thereof in the record of the District Court of Appeal.

The facts as to doing business in California have been indicated under questions presented, supra, all of which find corroboration in the deposition of the local representative, which is Exhibit "E" to the petition for a writ of mandate. (R. 11-46.)

Petitioners' statement of the basis of the Court's holding is incomplete, as indicated hereinabove under the heading "Questions Presented".

ARGUMENT.

I. NO TIMELY FEDERAL QUESTION WAS RAISED BY PETITIONERS IN THE COURTS OF CALIFORNIA.

The first effort by petitioners to raise a federal question was in their petition for a hearing by the Supreme Court of California, after decision by the District Court of Appeal, and after decision by the Superior Court in and for the City and County of San Francisco. (R. 63.) The respondents, in their answer to the petition for a hearing by the Supreme Court of California, made the point that under the procedural practice followed by the California Courts, an issue not raised in the trial Court could not be considered on appeal and *a fortiori* could not be considered in a petition for hearing by the State Supreme Court (R. 64-65), citing authorities therefor. The Supreme Court of California denied a hearing. (R. 65.) In order for petitioners to secure a hearing

before this Court, they must make a showing that the federal question was raised at the appropriate point under state procedure, *Hulbert v. Chicago*, 202 U.S. 275; *Mutual Life Insurance Company v. McGrew*, 188 U.S. 291.

II. THE CHANCE REFERENCE TO "DUE PROCESS" IN THE OPINION OF THE DISTRICT COURT OF APPEAL WILL NOT SUPPORT JURISDICTION BY THE SUPREME COURT OF THE UNITED STATES.

At the top of page 3 of the petition for a writ of certiorari, counsel for petitioners quotes a short section from the opinion of the District Court of Appeal in the case at bar, which says that the assumption of jurisdiction over the two foreign corporations was consistent with due process. Basing his contention upon that chance phrase, and upon that phrase alone, counsel for the petitioners is in the position of contending that the 14th Amendment to the Federal Constitution was considered by the District Court of Appeal of California. He bases his tenuous reasoning, apparently, upon the circumstances that the case at bar cites the case of *West Publishing Company v. Superior Court*, 20 Cal. (2d) 720, 128 Pac. (2d) 777, and upon the further circumstance that the case of *West Publishing Company v. Superior Court* cites the case of *Riverside, etc. Mills v. Menefee*, 237 U.S. 189; and upon the further circumstance that the case of *Riverside, etc. Mills v. Menefee* refers to the Federal Constitution as such. It is submitted that we

would have a new and startling precedent in federal jurisdiction, if an opinion might be said to have considered a federal question because the opinion cited a second opinion, which second opinion cited a third opinion, which third opinion may have considered a federal question.

In the case of *Thomas v. The State of Iowa,* 209 U.S. 258, 263, the State Court, like the State Court in the case at bar, had used the phrase "due process of law". This Court held:

> "But something more than this vague and inferential suggestion of a right under the Constitution of the United States must be presented to the State Courts to give us the limited authority to review their judgments which exists under the Constitution. * * * A mere claim in the court below that there has been a denial of due process of law does not of itself raise a federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the 14th Amendment to the Constitution."

III. THE REFERENCE TO "DUE PROCESS" IN THE DECISION OF THE DISTRICT COURT OF APPEAL MUST BE CONSTRUED AS REFERRING TO THE CALIFORNIA CONSTITUTION.

Section 13 of Article I of the California Constitution provides:

> "No person shall * * * be deprived of life, liberty, or property without due process of law * * *"

Under the authority of *Bowe v. Scott,* 233 U.S. 658, a reference to "due process" must be construed as referring to the State Constitution, where such Constitution contains a "due process" clause. That particular clause of the State Constitution has been interpreted as similar in purpose and scope to the "due process" clause of the Fourteenth Amendment, *Manford v. Singh,* 40 Cal. App. 700, 181 Pac. 844.

IV. EVEN IF A FEDERAL QUESTION HAD BEEN RAISED IN THE STATE COURT, THIS COURT WOULD NOT BE JUSTIFIED IN GRANTING CERTIORARI IN THIS CASE.

It has been pointed out in a lucid discussion in Vol. 18 of Fletcher on Corporations (Foreign Corporations, Section 8712), p. 339 et seq., that the criteria of whether a State may control foreign corporations differ depending upon whether the purpose of the control is (1) taxation; (2) regulation; or (3) jurisdiction for the purposes of suit. There are many citations to show that less is required for purposes of jurisdiction than for purposes of either taxation or regulation, in particular the case of *Tauza v. Susquehanna Coal Co.,* 220 N.Y. 259, 115 N.E. 915, an opinion by Justice Cardozo.

Counsel for the petitioners places great reliance upon *International Shoe Company v. State of Washington,* 326 U.S. 310. That case involved the power of the State of Washington to tax the foreign corporation, not just the power of the Courts of Washing-

ton to take jurisdiction over it. In that case, Mr. Chief Justice Stone said,

> "An estimate of the inconveniences which would result to the corporation from a trial away from its home or principal place of business is relevant in this connection."

The District Court of Appeal in the case at bar made a similar comment.

The petitioners seem to place reliance on the case of *Polizzi v. Cowles Magazines, Incorporated*, 197 Fed. (2d) 74 (5th Cir.). It is here submitted that petitioners misconstrue that case. There is no conflict between the *Polizzi* case and the case at bar for the reason that the *Polizzi* case was concerned with the construction of Florida law by a Federal District Court sitting in Florida and the case at bar is concerned with the construction of California law by a State Court of California. Neither one of these two cases involved a consideration of the Fourteenth Amendment to the United States Constitution. In the *Polizzi* case the Circuit Court of Appeals held that the foreign corporation in question was not doing business in Florida, with one judge dissenting and with the two who constituted the majority not delineating the reasons for their decision in any detail. Just as surely as the American judicial system is made up of a number of jurisdictions, each of them sovereign, there is room for difference between the law of Florida and the law of California with respect to this question as with respect to many other ques-

tions, and both may still be within the orbit of the Fourteenth Amendment to the Federal Constitution (even if that question had been raised and considered). It is interesting to note that the *Polizzi* decision cites *Rosenthal v. Frankfort Distillers Corporation*, 193 Fed. (2d) 137, a decision in the same Circuit, in which the Court said at page 141:

> "Appellant's insistence that the later decisions of the Supreme Court of the United States have made inapplicable the decisions cited and relied on by Appellee and the District Judge, misconceive the primary question at issue. This is not, as Appellant seems to think, what permissible reach, within the Federal Constitution, that court would, under the facts, give to a construction by the State Court of the Texas statute governing the doing of business in the State by, and the service of process upon, foreign corporations. *It is what construction the courts of Texas have actually given to the statutes.*" (Emphasis supplied.)

That there may be differences between the law of Florida and the law of California, or between the law of Texas and the law of California, these respondents would be the last to deny. That is the proposition involved in the precedent urged upon this Court by the petitioners.

With respect to the case of *McCarley v. Foster-Milburn Company*, 93 Fed. Supp. 421, cited on page 11 of brief for the petitioners, and distinguished by the opinion in the case at bar, two comments may be

made. One is that a Federal District Court sitting in New York State is in a less authoritative position to decide what constitutes doing business under California law than is an Appellate Court of the State of California. The other is that the Federal District Court misconceived the rationale of the factor acts, which were designed to permit distributors to pass title to goods which the distributors themselves do not own, in order to protect the ultimate consumers who buy the goods from the distributors in good faith. The factor acts were not designed to settle questions of what constitutes the doing of business, and the local representative's status as a factor, even if true, is not conclusive of this question by any means.

CONCLUSION.

No timely federal question was raised in the Courts of California. No federal question was considered there. Sufficient nexus has been shown to support jurisdiction; we are not here concerned with questions of the power of California to tax or to regulate foreign corporations. The sole question at issue is whether the California Appellate Court was correct in its decision of California law. No violation will be done to due process, to "the concept of ordered liberty," if these two petitioners are required to answer to the merits in the Courts of California.

It is respectfully submitted that the petition for certiorari should be denied.

Dated, San Francisco, California,
November 21, 1952.

EARL C. BERGER,
Attorney for Respondents.

EMMETT R. BURNS,
EDWARD A. FRIEND,
HOBERG & FINGER,
Of Counsel.